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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RYAN KAVANAUGH, Plaintiff and Respondent, v. MICHAEL SITRICK, Defendant and Appellant.	B208725 (Los Angeles County Super. Ct. No. BC359968)

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed.

Glaser Weil Fink Jacobs & Shapiro, Patricia Glaser, Mark G. Krum, Laura Premi; Shenoi Koes, Daniel J. Koes; Brown Shenoi Koes, Daniel J. Koes; Law Offices of Daniel J. Koes and Daniel J. Koes for Defendant and Appellant.

Weiss & Hunt, Thomas J. Weiss, Hyrum K. Hunt; K&L Gates, Carol A. Genis, Francis J. Higgins, Abram I. Moore; Bell, Boyd & Lloyd, Carol A. Genis, Francis J. Higgins and Abram I. Moore for Plaintiff and Respondent.

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INTRODUCTION

Defendant Michael Sitrick, individually and as trustee of the Michael and Nancy Sitrick Trust (Sitrick), appeals from a judgment against him and in favor of plaintiff Ryan Kavanaugh (Kavanaugh). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

A. *Kavanaugh*

In 2000, Kavanaugh was the sole owner of Kavanaugh Consulting, Inc. (KCI), a venture capital firm that found investments, set up limited partnerships to invest, and set up general partners to manage the limited partnerships. KCI was the general partner for and held a 16 percent ownership in KC Capital, LP (KC Capital).

Kavanaugh signed an internal Morgan Stanley customer form for trading options in Kavanaugh's name, dated March 1, 2000. The Morgan Stanley form reflected Kavanaugh's personal annual income as $5 million, net worth as $30 million, and liquid net worth as $5 million. An April 2001 internal Prudential Securities form for trades, including option trades, reflected Kavanaugh's personal annual income as $10 million; net worth as $30 million and liquid net worth as $15 million.

B. *Sitrick's Investment with Kavanaugh*

In 2000, as trustee of the Michael and Nancy Sitrick Trust, Sitrick invested $6.2 million[2] with KCI to purchase shares of KC Capital. Sitrick told Kavanaugh that he

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[1] The factual and procedural background is taken from the statement of decision dated February 22, 2008 issued by the trial court and subsequently adopted as the final statement of decision after consideration of written objections. (Code Civ. Proc., §§ 632, 634; Cal. Rules of Court, rule 3.1590.)

[2] Dollar amounts herein have been rounded for convenience of the reader. For purposes of resolving this appeal, however, we have considered the actual dollar amounts

wanted to avoid the risks associated with investing in private companies. Kavanaugh represented to him that there would be no investment in non-publicly traded securities. At the time of Sitrick's investment, however, approximately 50 percent of KC Capital was already invested in private securities.[3]

In July 2001, Sitrick became angry when he learned that KC Capital was invested in two private companies, PreNet and TeleCruz. In August, he demanded Kavanaugh return his investment or he would sue Kavanaugh.

David Resnick (Resnick) was the founder of PreNet (previously known as PreCash) and a member of its board of directors. In 2001, to recapitalize PreNet, Resnick sold his PreNet stock to KCI for $3.165 million. KCI distributed the stock to investors.

C. *Kavanaugh's Financial Decline After Events of September 11, 2001*

By late 2001, as a result of the events of September 11, 2001 and a downturn in the venture capital business, KCI was all but bankrupt and could not pay expenses or raise money. Kavanaugh's personal financial state deteriorated significantly. For three months, Kavanaugh lived rent free in a house owned by his fiancée, Kristine Peterson (Peterson). Then he moved to another house where he was a roommate of a student. He incurred credit card debt, had to sell everything he owned of value, and borrowed from friends and family. Eventually, Kavanaugh accumulated $200,000.

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as they appear in the record. Whether the dollar amounts were rounded has no effect on our analysis and decision in this appeal.

[3] KC Capital had interests in privately held corporations known as TeleCruz Technology, Inc. (TeleCruz), PreNet Corporation (PreNet), and a company founded by Kavanaugh's father, CLEAR, shares of which his father gave Kavanaugh who, in turn, gifted them to KC Capital. In addition to the foregoing companies and KCI, the trial court listed, as Kavanaugh entities, several other limited partnerships and the corporations which served as general partners of them (collectively also referred to as Kavanaugh-related entities).

In October 2001, Kavanaugh formed the Quidam Grantor Retained Income Trust (QGRI Trust) and the Quidam Inter Vivos Trust (QIV Trust). Both trusts named Kavanaugh as the beneficiary and Peterson as the trustee.

The QIV Trust was changed shortly to add an offshore entity as a co-trustee. The entity subsequently resigned due to lack of payment of management fees. The QIV Trust was never funded.

The QGRI Trust was funded when Kavanaugh transferred his house on St. Ives Drive (the St. Ives property) to the trust. In November 2001, Kavanaugh caused the St. Ives property to be sold for $2.9 million. He realized approximately $612,000 from the sale.

In December 2001, Kavanaugh coupled the $612,000 from the St. Ives property sale with the $200,000 he had and made high-risk options trades through Prudential. He lost all but about $100,000.

An investor, Edward Czuker (Czuker), had agreed in June 2001 to invest in KCI by purchasing a 15 percent interest for $20 million. After September 11, 2001, Czuker became upset with Kavanaugh because his investments in other Kavanaugh-related entities had not gone well. In November 2001, Kavanaugh and Czuker entered into a settlement and release agreement. Kavanaugh did not expect Czuker to complete the KCI share purchase.

Another investor, Jon Peters (Peters), who had invested in KC Capital shares, threatened to sue Kavanaugh to recover his $5 million investment. In November 2001, Kavanaugh reached a settlement with Peters, pursuant to which Kavanaugh caused 12 of the Kavanaugh-related general partnership entities to sign a promissory note to Peters for $8.3 million and secure the note with the partnerships' interests in investments.

D. ***Sitrick's Suit Against Kavanaugh***

In an effort to reach a settlement with Sitrick before he sued, Kavanaugh offered Sitrick his interest in PreNet and KCI's interest in KC Capital. Sitrick declined the offer.

On February 4, 2002, Sitrick filed suit against Kavanaugh as well as PreNet and TeleCruz.

Based upon his position as director in both PreNet and TeleCruz, Kavanaugh made claims against their insurers, Lumbermens Mutual Casualty Company (Lumbermens) and Northwestern Pacific Indemnity Company (Northwestern) (collectively, the insurance companies), with respect to Sitrick's lawsuit. The insurance companies denied the claims.

In settlement negotiations, Kavanaugh explained his financial state and lack of ability to pay Sitrick. Kavanaugh again offered PreNet stock, but Sitrick rejected it. Sitrick claimed that the PreNet stock had no value. He also asserted that KC Capital, TeleCruz, CLEAR and KCI had no value. During the proceedings prior to judgment, Sitrick represented that his investments in PreNet and TeleCruz made through KC Capital were worthless and that KC Capital had no market value.

In June 2002, Sitrick and Kavanaugh agreed to expedite resolution of the lawsuit by use of arbitration. As part of the agreement, Sitrick wanted assurances that Kavanaugh did not have the ability to pay him. Kavanaugh represented that as to himself and specified Kavanaugh entities, "the aggregated present market value of their cash, securities, bonds, metals, and real estate does not exceed $100,000." The entities consisted of KCI, KC Capital, and KC Target Opportunity Fund I.

E. ***Sitrick's Judgment; $100K Warranty in November 2002 Settlement Agreement***

Sitrick prevailed in the arbitration. Based upon the arbitration award, on October 28, 2002, the trial court entered judgment solely against Kavanaugh personally for $7.7 million.

Faced with the judgment, Kavanaugh's attorney said that Kavanaugh could easily file for bankruptcy. According to Kavanaugh's assessment, PreNet was still trying to raise cash but was virtually bankrupt. TeleCruz was in bankruptcy. CLEAR was no longer operating. KC Capital had stock in TeleCruz and CLEAR, which had book value, but no liquidity. KCI was a suspended corporation with unpaid taxes and debts.

Sitrick and Kavanaugh entered into a settlement agreement in November 2002. Rather than agreeing to release his claim against Kavanaugh, Sitrick covenanted not to execute on the $7.7 million judgment. In return, Kavanaugh warranted that he did not have specified assets exceeding $100,000 in value at the time he executed the agreement, and he assigned his causes of action against the insurance companies to Sitrick and agreed to cooperate in any litigation against them. Prior to signing the agreement, Sitrick had been informed of the possibility that Kavanaugh could file for bankruptcy. Kavanaugh relied on the negotiation discussions and the resultant agreement in electing not to file for bankruptcy.

Kavanaugh's warranty in the November 2002 settlement agreement (the 100K warranty) read as follows: "Kavanaugh warrants and represents that the aggregated value of his cash, securities, bonds, metal and real estate does not exceed $100,000 . . . . (Any knowing misrepresentation or inaccuracy as to these aforesaid representations . . . shall vitiate and release Sitrick from all obligations hereunder to Kavanaugh not to execute on the Judgment)."

Kavanaugh signed the agreement and transmitted it to Sitrick's attorney on November 19, 2002. On the same day, Kavanaugh borrowed $162 from his parents to pay moving expenses. Sitrick signed the agreement in December.

F. ***Kavanaugh's Post-Settlement Financial History***

In November 2002, Kavanaugh held no publicly traded securities, no bonds, no metals and no real estate. He held private securities in PreNet, some personally and others through KC Capital. He owned KCI. Kavanaugh had $415 in the bank. The QIV Trust had a balance under $400. Kavanaugh's ex-wife had a lien on his accounts.

Kavanaugh had outstanding balances with his litigation attorney and his marital dissolution attorney. The attorneys held a total of about $36,000 of Kavanaugh's funds in November 2002 in trust accounts as retainers pursuant to agreements with Kavanaugh. He owed the litigation attorney about $100,000 and the marital dissolution attorney about $20,000. In December, the litigation attorney applied the funds he held to Kavanaugh's

outstanding balance. Kavanaugh also owed more than $100,000 in loans to two other persons.

KCI received $50,000 from Resnick in November 2002 as an advance for travel expenses and services to be provided in connection with Resnick's interest in obtaining investors in Bahrain. When no investments resulted from the travel, KCI then owed Resnick the $50,000.

In January 2003, Kavanaugh transferred shares of PreNet to Peterson in exchange for Peterson's forgiveness of her loan to him. The loan consisted of payments she made for him to cover his personal and business expenses during 2002. The transfer was in the form of a sale of 75,000 shares to Peterson for $20,000, but no money was exchanged in the sale.

In February 2003, Kavanaugh rented a home on Beverly Ranch Road (the Beverly Ranch property) with a roommate. His grandparents helped him pay the rent, which was $5,400 per month. For about eight months Kavanaugh did not pay the rent. The property went into foreclosure and, in November 2003, a receiver was appointed to operate the property. He informed Kavanaugh that he was selling the property. Kavanaugh made an offer of $1.2 million, which was accepted. Kavanaugh made a $50,000 down payment and obtained a hard money loan for the rest. Prior to closing, the receiver brought an unlawful detainer action against Kavanaugh. As a result of ensuing negotiations between Kavanaugh's attorney and the receiver, the Beverly Ranch property sale closed.

G. *Suit by Sitrick and Kavanaugh Against Insurers*

Sitrick and Kavanaugh sued the insurance companies in April 2003. Sitrick received $1.2 million in settlement from Lumbermens. Northwestern prevailed at trial. Sitrick's attorney fees exceeded the $1.2 million settlement with Lumbermens.

In the litigation with the insurance companies, Kavanaugh stated in his deposition that he believed that his investments had no liquidity, but they did have book value. He stated the value of his 60,000 to 70,000 shares of CLEAR was $300,000 to $350,000 and the value of his 60,000 shares of PreNet was $51,000. He said that the value of KC

Capital was $20 million. Kavanaugh testified also that the value of the capital account for KC Capital was $2.5 million. Sitrick testified that, at the time of the arbitration, he believed his investments through KC Capital in PreNet and TeleCruz were worthless.

In November 2004, Kavanaugh heard that, because of Kavanaugh's deposition in the insurance companies litigation, Sitrick believed that the 100K warranty in the November 2002 settlement agreement was inaccurate. Kavanaugh reiterated in a written message to Sitrick's attorney that the 100K warranty had been true. During or after the insurance companies litigation, Kavanaugh never received any communication from Sitrick questioning whether the 100K warranty had been true.

H. ***Sitrick's Order To Enforce Judgment and Kavanaugh's Subsequent Suit Against Sitrick***

On September 18, 2006, without notice to Kavanaugh or his attorney, Sitrick initiated an ex parte proceeding before the court to enforce Sitrick's October 2002 judgment against Kavanaugh. Sitrick obtained an "Order Restraining Judgment Debtor," restraining Kavanaugh from encumbering, disposing of or diminishing his assets. Kavanaugh learned of the order on September 20, while he was negotiating a $4.5 billion financing deal that could be worth hundreds of millions to Kavanaugh's company, Relativity Media, which had by then become highly successful in the business of financing for motion pictures. Kavanaugh petitioned for a writ of mandate to vacate the order. On November 22, 2006, Division One of this court issued the writ.

Kavanaugh initiated the instant action against Sitrick, individually and as trustee of The Michael and Nancy Sitrick Trust, on October 10, 2006.[4] The operative complaint

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[4] During pretrial proceedings, the trial court related and consolidated Sitrick's suit (*Sitrick v. Kavanaugh, PreNet Corporation, TeleCruz Technology, Inc.* (Super. Ct. L.A. County, 2002, No. BC267621)) with Kavanaugh's suit, with the parties' rights and obligations to be determined in Kavanaugh's suit (*Kavanaugh v. Sitrick* (Super. Ct. L.A. County, 2008, No. BC359968)).

is the second amended complaint. Kavanaugh sought declaratory relief with respect to the June 2002 arbitration agreement and the November 2002 settlement agreement.[5]

In the pretrial proceedings, Sitrick served several discovery requests on Kavanaugh and numerous subpoenas on various banking, lending and other financial institutions. Sitrick and Kavanaugh brought various discovery-related motions against each other. As the result of one of Sitrick's motions to compel, the trial court imposed sanctions in the amount of $3,600 against Kavanaugh and his attorney.[6]

I. ***Expert Testimony on Value of Kavanaugh's Assets***

During trial, the court heard expert testimony from Kavanaugh's expert, Mark Hosfield (Hosfield), and Sitrick's experts, James Dowling (Dowling) and James Yerges (Yerges), related to the value of Kavanaugh's "cash, securities, bonds, metal and real estate" in regard to whether Kavanaugh's 100K warranty was knowingly false or inaccurate. It was undisputed that, in November 2002, Kavanaugh held no publicly traded securities, bonds, metals or real estate. The experts' opinions related to the value of cash and private securities held by Kavanaugh and the value of KCI and PreNet.

Hosfield evaluated the cash and securities, including Kavanaugh's interests in private companies, which belonged to Kavanaugh as of November 13, November 19 and December 10, 2002. According to Hosfield's chart, the aggregate "realizable value"[7] of Kavanaugh's holdings in cash and securities on each of the three dates was less than $10,000. Hosfield showed that Kavanaugh owed millions of dollars for loans made to

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[5] Kavanaugh's second cause of action for breach of contract was dismissed in pre-trial proceedings.

[6] A more detailed presentation of facts regarding the discovery disputes between the parties is set forth in the Discussion below.

[7] In testimony, Hosfield defined "realizable value" of a holding as follows: "It is market value of the holding to the extent there is debt associated with the holding that would interfere with the ability to get to the funds. Then you have to subtract that associated with the holding and that is how you end up with realizable value."

him by various individuals. One of the loans originated in 2001, when Kavanaugh purchased additional PreNet stock from Resnick for $2.831 million and paid Resnick with a promissory note.

Hosfield calculated that Kavanaugh's other debts totaled well over $100,000. Hosfield testified that, in his opinion, "[t]he aggregated value of [Kavanaugh's] cash, securities, bonds, metals and real estate did not exceed $100,000. It wasn't even close."

Among Kavanaugh's holdings were his PreNet stock and KCI. Sitrick's business valuation expert, Yerges, opined that PreNet had a $20 million equity value as of November 19, 2002. The value was based in part on the assumption that, by year's end in 2002, Czuker would buy 15 percent of PreNet stock for $20 million pursuant to a deal that had been pending about 18 months. Yerges acknowledged PreNet was insolvent in September 2002 and was certain to go out of business without additional financing. The Czuker stock purchase never occurred. Yerges also acknowledged that he did not know if there was a market for PreNet shares in November 2002.

KCI had $2,081 in its bank account and held 16 percent of KC Capital, the assets of which were stocks in various private entities, all of which were bankrupt or in deep financial trouble. The best valuation of KCI was a liquidation value of $2,530. Neither PreNet nor KCI had a cash flow stream. There was a strong probability that the two companies would go out of business.

Sitrick's expert, Dowling, presented his opinion that, during the period from August 2001 to November 2002, over $4 million was transferred from Kavanaugh-related entities to unknown accounts. Dowling based his opinion on bank statements and wire transfer documentation. Dowling did not attempt to trace the funds. The purpose of the evidence was to raise an inference that Kavanaugh had the monies but had hidden them. Dowling presented a chart identifying 81 transfers (Dowling's exhibit).[8]

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[8] The total originally identified by Dowling was $4.526 million. After further evidence was received, Dowling submitted a revised accounting which totaled $4.126 million. For convenience, we will refer to the total amount claimed by Dowling as $4 million.

Hosfield interpreted Dowling's evidence in light of Hosfield's knowledge of the Kavanaugh-related entities and their accounts as well as his own expertise. On almost a line-by-line basis, Hosfield accounted for the disposition of the $4 million.

J. *Statement of Decision and Judgment Against Sitrick*

The parties completed a six-day bench trial in January 2008. The trial court issued a tentative statement of decision on February 22, 2008, which was subsequently adopted as the statement of decision.[9] The statement of decision included the facts set forth above regarding the finances of Kavanaugh and the Kavanaugh-related entities, and their business transactions with Sitrick. Also included were the following findings and conclusions reached by the trial court.

The issues in the litigation were "the interpretation of the 100K warranty and whether it was accurate." Kavanaugh had the burden to prove the existence of the November 2002 settlement agreement and that he was released under it. Sitrick had the burden to prove his affirmative defense of alter ego.

The trial court interpreted the 100K warranty in accordance with its plain meaning as follows: "Kavanaugh as an individual was warranting that the fair market value of the five listed categories of his assets, including public and private stock, did not exceed $100,000. If this statement was knowingly false, then Sitrick would be entitled to

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Dowling's initial chart regarding the $4 million was admitted as Exhibit 576. Based on the additional information he heard during trial, Dowling amended Exhibit 576 by interlineating it to eliminate some of the entries. The interlineated chart was admitted as Exhibit 723 and was the basis for Dowling's testimony on the $4 million.

[9] Before the statement of decision became final by operation of law, Sitrick submitted a written request for a statement of decision and his objections to the February 22 document, pursuant to Code of Civil Procedure section 632 and California Rules of Court, rule 3.1590. The objections did not dispute facts admitted into evidence at trial, findings or legal conclusions. They were in the form of three questions regarding the burden of proof on specified issues and asking whether the court's reference to "relatively minor amounts" on pages 31 through 32 were references to $272,000 or other amounts appearing on trial Exhibit 576.

execute on the judgment." The 100K warranty applied to Kavanaugh's knowledge of the total fair market value of the "cash, securities, bonds, metals and real estate" which Kavanaugh, as an individual, owned at the time Kavanaugh made the warranty in November 2002. No business entities were "mentioned, and would only be included if they were his alter egos as a matter of law." Fair market value "means what a willing buyer will pay a willing seller." To be in breach, Kavanaugh had to have the required scienter, that is, Kavanaugh had "to know that the 100K warranty is false to be in breach." Information about the specified assets was relevant only if it pertained to the period from 2001, when Sitrick first threatened to sue Kavanaugh, through 2003, the year after Kavanaugh made the 100K warranty.

It is undisputed that in November 2002, Kavanaugh had no "securities [that were publicly traded], bonds, metals and real estate." Kavanaugh had an interest in the Kavanaugh-related entities, consisting of privately held corporations and limited partnerships. According to the trial court, the term "securities" as used in the 100K warranty "includes stock, public or private, held by Kavanaugh as a passive investment in businesses operated by others, not [Kavanaugh's] wholly-owned businesses . . . ." Therefore, the trial court determined, Kavanaugh's interests in the Kavanaugh-related entities did not qualify for evaluation as a security.

The trial court found that Kavanaugh's business entities were not the alter egos of Kavanaugh. Their values and assets could not be included in the 100K warranty, in that the warranty included only assets owned by Kavanaugh as an individual. There was no merit to Sitrick's claim that Kavanaugh owned the business entities on the basis that Kavanaugh effectively controlled the assets of the business entities and, therefore, he was the presumed owner pursuant to Evidence Code section 638. The fact that the business entities existed as either corporations or limited partnerships rebutted the Evidence Code section 638 presumption of ownership. Accordingly, the trial court said, the assets of the Kavanaugh-related entities were not included in assets specified in the 100K warranty.

The trial court determined that the assets of the QGRI Trust and the QIV Trust, however, were included in the 100K warranty. Kavanaugh controlled the Trusts' assets

and used them for his own benefit, and the purported trustees did not recognize the distinction between Kavanaugh as the beneficial owner of the assets and themselves as holders of legal title to the assets.

In November 2002, Kavanaugh owned KCI and stock in PreNet, and the QIV Trust owned PreNet stock. Sitrick's business valuation expert, Yerges, opined that KCI and PreNet had fair market value, but all of his approaches for valuation were speculative. Kavanaugh's expert, Hosfield, opined that there was no market for either company. According to the trial court, "fair market value is what a willing buyer would pay a willing seller," and, therefore, KCI and PreNet had zero fair market value. The conclusion is not affected by the $2.5 million capital account indicated on Sitrick's 2002 K-1 report for KC Capital, in which KCI and Sitrick each held an approximately 16 percent interest. The trial court explained that "a K-1 is an accounting tool to manage capital gains and losses, and is not intended to reflect market value." Despite Kavanaugh repeatedly offering his interest in PreNet and KCI's interest in KC Capital to Sitrick during their efforts to settle the Sitrick litigation, Sitrick declined the offers, in part, because he believed they had no value.

In November 2002, according to the trial court, Kavanaugh was impoverished. He personally had little cash or income. He had $415 in the bank and held a similar amount in the QIV Trust. The court found that the $36,000 in retainers Kavanaugh paid to his litigation attorney and his marital dissolution attorney belonged to the attorneys, not Kavanaugh, and were not included in the $100,000 warranty. In addition, the representations of Kavanaugh's income and assets on the 2000 Morgan Stanley and 2001 Prudential customer forms were incorrect and Kavanaugh did not supply the information on them. Kavanaugh had to rely on loans and generosity of his parents, grandparents and fiancée for living expenses and housing. The court noted that Kavanaugh also owed on other loans. His ex-wife had a lien on his accounts. Kavanaugh had approximately $447,000 in income in 2001, but could not pay his 2001 income tax in 2002. If Kavanaugh had had the ability to pay in 2002, the court reasoned, he would not have incurred more than $200,000 in penalties by the time he paid the 2001 tax in 2006.

The remaining findings and conclusions related to the $4 million reflected on Dowling's exhibit which Dowling claimed went to unknown accounts and, therefore, gave rise to the inference that Kavanaugh hid the monies. The trial court determined that Dowling's exhibit was relevant "only insofar as it reflects on whether Kavanaugh moved money offshore or otherwise hid it." Dowling's methodology was limited, in that he listed all transactions in specified accounts between August 2001 and November 2002 if the canceled check, wire instruction or other documentation did not show both a "pay to" and a "destination account number." He did not attempt actually to identify the monies in question or to determine whether Kavanaugh ever received them. As Dowling testified, not all cancelled checks were reviewed and the documentation of the transactions was incomplete.

Kavanaugh's expert, Hosfield, unlike Dowling, tried and was able to trace the $4 million shown on Dowling's exhibit. Hosfield testified that the limited partner and other transactions took place and matched up with the corresponding numbers on the exhibit. "It is evident that many of the entries are explainable based on what had to have happened. Thus, the monies paid by KC Aris Fund directly to KCI and Kavanaugh Fund, or to the Quidam Inter Vivos Trust, were used for management fees and expenses of KC Aris Group. Other monies were for KC Aris to pay its 10 limited partners. A large part of the money ($3.15 million) was the Resnick stock transaction." The trial court found Kavanaugh's explanations to be credible and Hosfield's testimony more credible than Dowling's testimony.

Neither Hosfield nor Dowling was able to examine any check registers, board minutes, general ledgers, or tax returns for the relevant Kavanaugh-related entities. The trial court found that, in many cases, there was no evidence that the documents ever existed. The court also ruled that there was no showing that Kavanaugh willfully withheld any general ledgers, accounts receivable, accounts payable or check registers for the Kavanaugh-related entities.

Dowling disagreed with Hosfield's tracing methodology and opinion. In Dowling's opinion, it is not appropriate in forensic accounting to try to match numbers in

a transaction with other numbers that might be the correct destination; rather, definitive evidence of the destination is required.

Other evidence showed that Kavanaugh had little or no cash or income in 2002. The court explained that it "gave Sitrick every opportunity to take discovery to trace Kavanaugh's assets and evaluate his 2002 financial state. If Kavanaugh's testimony about his desperate straits was untrue, Sitrick would have rebutted it." The court explained that Kavanaugh's actions in selling the St. Ives property for a $200,000 loss and gambling away the $612,000 sale proceeds in options trading showed "both that Kavanaugh had no other funds available and that he was desperately searching for any means, no matter how risky, to right the ship."

The trial court concluded that "[t]he 100K warranty was not knowing[ly] inaccurate, nor did it contain a knowing misrepresentation." The court stated further that "Kavanaugh made a fortune, lost it, and made another all before his mid-30's . . . but it is undeniable that he was impecunious at the time of the 100K warranty. [¶] He did not have assets in the five categories listed in the 100K warranty approaching a total value of $100,000. It follows that he did not make a knowing misrepresentation or inaccuracy in the 100K warranty. Sitrick is bound by the November 2002 Agreement and may not execute the judgment against Kavanaugh."

The judgment entered on March 13, 2008, stated that "[d]efendant Michael Sitrick is bound by the November 2002 settlement agreement and may not execute on the October 28, 2002 'Judgment Confirming Arbitration Award Against Respondent Ryan Kavanaugh entered in Case No. BC267621.'" The trial court denied Sitrick's subsequent motions for a new trial and to vacate judgment.[10]

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10 Kavanaugh filed a notice of protective cross-appeal on July 10, 2008. Pursuant to Kavanaugh's notice of withdrawal, the cross-appeal was dismissed by order filed September 1, 2009.

DISCUSSION

On appeal, Sitrick's primary contention is that Kavanaugh failed to meet his burden of proof, in that he failed to prove that the destination accounts for the $4 million in transfers shown on Dowling's exhibit were not Kavanaugh's accounts. Sitrick claims further that the trial court abused its discretion in relying on hearsay evidence provided by Hosfield as the basis for his opinion that the destination accounts were not owned by Kavanaugh.

As to discovery, Sitrick contends that the trial court abused its discretion and denied him due process and a fair trial, in that the court refused to enforce its own discovery orders compelling Kavanaugh to produce financial documents, including his income tax returns and Prudential Securities account information about Resnick's receipt of $3.165 million from KCI for purchase of his PreNet stock. Other than with respect to the disposition of the $4 million and enforcement of orders compelling discovery, Sitrick does not challenge the legal rulings, contractual interpretation or factual findings of the trial court.

For the first time on appeal, Sitrick raises the defense of unclean hands. Sitrick contends that the unclean hands doctrine precludes Kavanaugh from obtaining the equitable relief he sought. As we discuss more fully below, we conclude that none of Sitrick's contentions warrants reversal, and we affirm the judgment.

A. *Burden of Proof*

Sitrick contends that Kavanaugh failed to meet his burden of proof. The parties do not dispute the burden of proof set forth by the trial court in the statement of decision: "Kavanaugh has the burden of proof on his declaratory relief claim. Pursuant to this burden, he is obligated to show the existence of the November 2002 Agreement and that he was released under it. . . . [¶] . . . [¶] Kavanaugh has the burden of proof to show that the 100K warranty was accurate . . . . Kavanaugh did not breach the 100K warranty unless he knew it to be false or inaccurate."

The sole basis upon which Sitrick contends that Kavanaugh did not meet his burden of proof is that Kavanaugh failed to identify the owners of the destination accounts into which each of the 81 transfers listed on Dowling's exhibit was deposited and that Kavanaugh did not receive any of the $4 million transferred.

Contrary to Sitrick's contention, as the trial court stated in the hearing on Sitrick's motion for a new trial, the purpose of the trial "was not to address . . . Dowling's exhibit . . . . It was for . . . Kavanaugh to show he didn't have" $100,000. The latter showing is the fact which was "essential to the claim for relief," and thus, for which Kavanaugh had the burden of proof. (Evid. Code, § 500.) Also as alluded to by the trial court, given that this was a civil case, the degree of proof required was a preponderance of the evidence (Evid. Code, § 115), not "beyond a reasonable doubt" as required to prove guilt in a criminal case.

Thus, our task is to determine whether substantial evidence supports the trial court's findings in the statement of decision (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 501) that Kavanaugh "did not have assets in the five categories listed in the 100K warranty approaching a total value of $100,000. It follows that he did not make a knowing misrepresentation or inaccuracy in the 100K warranty." Evidence is substantial if it is "of ponderable legal significance, reasonable . . . , credible, and of solid value." (*Ibid.*)

It is well established that "[o]ur authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment. . . . If this 'substantial' evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment must be upheld." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630-631.) We accept as true all evidence, and reasonable inferences therefrom, which support the trial court's findings and judgment. (*Ibid.*) We disregard any contrary showing. (*Schaefer's Ambulance Service v. County of San Bernardino* (1998) 68 Cal.App.4th 581, 586.) We defer to the trial court's determinations on credibility and weight of the

evidence. (*Howard, supra*, at p. 631; *Oldham v. Kizer* (1991) 235 Cal.App.3d 1046, 1065.)

The trial court had ample evidence provided by Kavanaugh to substantiate its findings that Kavanaugh did not make a knowing misrepresentation or inaccuracy in the 100K warranty. Kavanaugh testified regarding his financial circumstances and provided supporting bank records and other documentary evidence. Hosfield presented his expert opinion, and the basis for it, that the value of the specified assets which Kavanaugh owned at the time he made the 100K warranty did not exceed and "wasn't even close" to $100,000. The trial court found explanations by Kavanaugh and Hosfield to be credible. Sitrick does not challenge the trial court's findings that, at the time Kavanaugh made the 100K warranty, Kavanaugh had about $400 in cash in his personal bank account and his trusts had a similar amount of cash. Sitrick does not challenge the trial court's findings that, at that time, Kavanaugh's interests in KCI and in PreNet had no value. Sitrick does not challenge the trial court's findings that Kavanaugh-related entities were not the alter egos of Kavanaugh, and, therefore, the value of their assets at the time Kavanaugh made the 100K warranty was not relevant.

As to the $4 million in Dowling's exhibit, it is undisputed that Dowling did not prove that any of the monies went to Kavanaugh. Dowling did not attempt to trace the funds. In addition, the trial court found that Dowling's exhibit did not create the inference that Kavanaugh ever received the funds listed in the exhibit. During the trial, Sitrick had opportunity to, but did not, examine Kavanaugh to elicit his testimony as to whether he received any of the $4 million. The exhibit and Dowling's related opinions present no evidence inconsistent with the trial court's findings regarding Kavanaugh's assets.

Sitrick claims repeatedly that Kavanaugh presented no evidence showing he did not receive the funds. The claim substantially mischaracterizes the record. First, Kavanaugh testified at length concerning his financial picture in 2001 through 2003, and provided bank statements and other supporting documentation. Second, on behalf of Kavanaugh, Hosfield was examined and cross-examined at length about his expert

opinion tracing the amounts on Dowling's exhibit to other destinations. Application of the substantial evidence standard of review requires that we resolve any conflict between Dowling's exhibit and evidence presented by Kavanaugh in favor of upholding the trial court's findings. (*Canister v. Emergency Ambulance Service, Inc.* (2008) 160 Cal.App.4th 388, 394.)

Sitrick seeks to negate the evidentiary value of Hosfield's opinion by contending that the trial court improperly relied on hearsay to which Hosfield referred in his testimony. In the post-trial hearing, Sitrick raised a similar claim. The trial court noted its awareness of Hosfield's references to inadmissible information and said that the court's conclusion was based only on evidence admitted at trial. For example, in tracing certain funds on Dowling's exhibit to the Resnick transaction, Hosfield used bank statements and a PreNet information memorandum which had been admitted into evidence without objection. Sitrick did not object when Hosfield testified that the PreNet information memorandum showed the destination of the $3.165 million attributed to the Resnick transaction. Having failed to object to the introduction of the evidence, Sitrick waived any such objection on appeal. (Evid. Code, § 353; *Fry v. Pro-Line Boats, Inc.* (2008) 163 Cal.App.4th 970, 974.)

In any event, the trial court concluded that Dowling and his exhibit lacked credibility, and, in view of compelling evidence that Kavanaugh did not have any such funds, that the exhibit was of little use. We must defer to the trial court's determinations on credibility and weight of the evidence. (*Howard v. Owens Corning*, *supra*, 72 Cal.App.4th at p. 631; *Oldham v. Kizer, supra*, 235 Cal.App.3d at p. 1065.)

Sitrick mistakenly asserts that "[t]o prevail, Kavanaugh had the burden of identifying and proving that the accounts into which he moved those monies were owned by third parties." It appears that for supporting authority, Sitrick cites to the trial court's May 2007 written decision denying Kavanaugh's motions to quash certain subpoenas. The cited pages, however, discuss only the years for which Kavanaugh was obligated to provide discovery. Nothing in the May 2007 decision sets forth the standard Sitrick

asserts. Neither does the statement of decision. Sitrick raised no objection below to the text setting forth Kavanaugh's burden of proof in the statement of decision.

The irrelevant record citation is but one example of the many inaccurate record citations and mischaracterizations of facts and findings of the trial court which we found in Sitrick's opening brief. Kavanaugh claims that, with respect to his burden of proof contention, the deficiencies are sufficient to warrant that Sitrick's contention be deemed waived. California Rules of Court, rule 8.204(a)(1)(C) requires that all appellate briefs must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." It also provides that an appellant's opening brief must "[p]rovide a summary of the significant facts limited to matters in the record." (*Id.*, rule 8.204(a)(2)(C).) The factual summary must present all the material facts, not just the appellant's evidence. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) Failure to present a fair statement of the facts, accompanied by corresponding specific citations to the record, results in waiver of any contention or argument based upon the absence of substantial evidence to support the trial court's conclusion. (*Ibid.*)

In our view, Sitrick's presentation of his burden of proof contentions is subject to waiver on such a basis. In any event, we conclude that substantial evidence supports the trial court's finding that the value of Kavanaugh's assets in question did not exceed $100,000 at the time he made the 100K warranty. (*Howard v. Owens Corning*, *supra*, 72 Cal.App.4th at pp. 630-631.) Therefore, the trial court properly found that Kavanaugh sustained his burden of proof.

B. *Discovery*

Sitrick contends that certain discovery and evidentiary rulings by the trial court constituted an abuse of discretion and denied Sitrick due process and a fair trial, thereby rendering the judgment reversible per se. (*In re Angela C.* (2002) 99 Cal.App.4th 389, 394.) In his opening brief, Sitrick states: "Simply said, the trial court abused its discretion and denied Sitrick due process and a fair trial because it allowed Kavanaugh to

. . . resist[] discovery, fail[] to provide court ordered discovery and selectively produc[e] documents on the eve of trial."

Sitrick makes many broad, general claims of discovery errors by Kavanaugh and the trial court related to financial information. His most specific contention is that Kavanaugh failed to produce tax returns and the trial court failed to enforce its orders regarding them. Otherwise, Sitrick fails to identify specific discovery requests that he claims Kavanaugh did not comply with, what the offending omission or insufficiency was, and the specific court order related to the requests which Kavanaugh failed to obey or which the trial court failed to enforce against Kavanaugh. Sitrick cites to the record only in his introductory statement of facts about discovery related to his contentions. Review of the citations reveals that the facts are far different from the version given by Sitrick.

Discovery in this case was extensive and involved multiple motions by the parties, resulting in multiple hearings and orders by the trial court. Although we reviewed the record with respect to discovery to a considerable extent, due to the deficiencies in Sitrick's briefs, we were unable to review the majority of his claims of error. It is well established that "'[t]he appellate court is not required to search the record on its own seeking error.' [Citation.] Thus, '[i]f a party fails to support an argument with the necessary citations to the record, . . . the argument [will be] deemed to have been waived. [Citation.]' [Citations.]" (*Nwosu v. Uba, supra,* 122 Cal.App.4th at p. 1246; see also Cal. Rules of Court, rule 8.204(a)(1)(C) & (a)(2)(C).) Accordingly, Sitrick's arguments regarding discovery abuses by Kavanaugh and the trial court's failure to enforce its own discovery orders are deemed waived, except with respect to the tax returns.

With respect to the tax returns, the record shows that the trial court ultimately found that Kavanaugh had complied with Sitrick's discovery requests and the court's orders related to them. Review of the record reveals that Sitrick served Kavanaugh with multiple sets of discovery requests. He also served several subpoenas to financial institutions and credit card companies to obtain financial records regarding Kavanaugh, members of his family, and Kavanaugh-related entities. When Sitrick did not receive

responses to the discovery requests satisfactory to him, he filed a motion to compel against Kavanaugh. Kavanaugh filed motions to quash certain subpoenas.

The trial court heard the parties' motions on May 21, 2007. The trial court ruled that the relevant financial records were those from 2000 through 2003. The year range covered the period from Sitrick's first threat to sue through the parties' entry into the November 2002 settlement agreement and included the year prior to and the year after the period. In addition, the trial court ruled that the fact that Kavanaugh had previously asserted that he did not have enough money to pay his 2001 income taxes did not act as a waiver of the taxpayer privilege.

The court granted Sitrick's motion to compel, but only with respect to information and documents from the period of January 2000 through December 2003. As to Sitrick's interrogatories, the court ordered Kavanaugh to respond without objection. However, after Sitrick's attorney stated that there was no need to apply the same requirement with respect to the requests for production, the court did not include the "without objection" proviso in its order to respond to Sitrick's requests for production of documents. The trial court denied Kavanaugh's motion to quash subpoenas insofar as they requested records from the same period, 2000 through 2003, but granted the motion to quash subpoenas for Kavanaugh's loan applications and financial statements for 2004 and 2005.

The trial court adopted its tentative decision, except as orally modified, as the order. A file-stamped copy of the tentative decision is in the record. However, we could not find any portion of a reporter's transcript in the record that would enable us to ascertain the court's order as orally modified.[11]

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11 Sitrick failed to provide a sufficient record to determine the trial court's orders related to the tax return production issues. The partial transcript for the May 21 hearing reads: "THE COURT: The tentative is adopted as the order of the court except as modified orally at hearing." We did not find a full transcript of the hearing on May 21, 2007. Nor did we find any minute order or other written order compelling Kavanaugh to produce the tax documents without objection. Failure to provide an adequate record or a fair statement of facts is cause to deem the issue waived. (Cal. Rules of Court, rule 8.204(a)(1)(C) & (a)(2)(C); *Nwosu v. Uba*, *supra*, 122 Cal.App.4th at p. 1246.)

In July 2007, Sitrick served Kavanaugh with set four of special interrogatories with respect to which, in October, he filed a motion to compel and for sanctions for discovery abuses. Sitrick claimed that Kavanaugh did not provide legally sufficient responses to certain special interrogatories in set four,[12] related requests for production of documents and also requests for admissions. At the hearing on November 15, 2007, the trial court ordered Kavanaugh to respond to the interrogatories and the corresponding requests for production of documents, as well as the requests for admissions, all without objections and within 10 days of the ruling. The court imposed $3,600 in sanctions against Kavanaugh and his attorney.

Kavanaugh served responses to the special interrogatories (set four) on November 30, 2007. As requested by certain interrogatories, Kavanaugh stated the dollar amount of his annual cash income for 2000 through 2003. In responses to related interrogatories requesting Kavanaugh to identify documents evidencing the receipt of cash income for 2000 through 2003, Kavanaugh stated: "Documents of which Plaintiff is aware that evidence such 'cash income' are protected from disclosure under the taxpayer's privilege."

On December 14, 2007, Sitrick made ex parte application for an order compelling Kavanaugh to identify and produce the documents. In Sitrick's ex parte application, Sitrick expressly stated that he was "not seeking Kavanaugh's tax returns, or even information that is an 'integral part' of a tax return . . . . Sitrick seeks identification of documents evidencing the deposit of cash income . . . ."

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[12] The interrogatories were numbered 234 through 333. Almost all were at issue: numbers 234-236, 238-243, 245-250, 252-257, 259-273, 289-333, all of which sought information directly pertaining to Kavanaugh's cash income and documents showing the source of the income for 2000 through 2003, his living expenses, all of his personally owned assets which he liquidated, all for the period from 2000 through 2003.

The trial court granted Kavanaugh's request for an opportunity to brief the taxpayer privilege issue[13] and continued the hearing to the date set for trial to begin, January 2, 2008. The parties also stipulated that the discovery period would be extended to the same date.

Kavanaugh continued to provide discovery responses. On December 28, 2007, Sitrick filed a motion in limine to bar Kavanaugh from introducing belatedly produced documents, which did not include the tax returns.[14]

On January 2, 2008, the trial proceedings began. The trial court denied Sitrick's motion in limine and the hearing on the ex parte motion to compel resumed as scheduled. Sitrick argued that Kavanaugh identified the documents on which his 2000 through 2003 income figures were based and then improperly claimed they were protected by the taxpayer privilege.

The trial court pointed out that Sitrick's underlying October 2007 motion to compel pertained only to responses to certain interrogatories and not to requests for production of documents, including tax returns. The trial court acknowledged that Kavanaugh had provided supplemental responses and that Sitrick's attorney said that was acceptable. The trial court noted that Sitrick's ex parte motion did not include a request that the objections in the answers to the interrogatories be stricken or otherwise overcome. The trial court said "when and if you can demonstrate that [the responses provided by Kavanaugh] are incorrect, then you can present that to the court." The court

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13 Specifically, Kavanaugh claimed that the May 21, 2007 discovery order stating that Kavanaugh had not waived the taxpayer privilege was the basis on which he responded as he did. Sitrick claimed that the subsequent discovery order of November 15, 2007 required Kavanaugh to respond without objection and produce the purportedly privileged document.

14 The documents Sitrick sought to exclude from use at trial pertained to the Beverly Ranch Road property purchased in 2004, documents concerning an agreement supposedly entered into by Kavanaugh and Jon Peters, documents related to KC Aris Fund I, LP, a retainer agreement by Kavanaugh with a law firm, as well as settlement and related documents between Kavanaugh and Czuker from 2005.

indicated that there was no need to compel further responses unless it could be shown that the interrogatory answers were insufficient. Then the court said, "Okay, so back to conduct of the trial."[15]

The record reveals that the trial court never ordered Kavanaugh to produce the tax returns. Therefore, Kavanaugh's withholding of the tax returns did not violate any court order. It follows that the trial court did not fail to enforce its own orders with respect to the tax return. Sitrick's contentions otherwise are without merit.

Sitrick claims that Kavanaugh conducted "trial by ambush," in that he produced further discovery responses on the eve of trial. He appears to ignore that, in August 2007, the parties stipulated to the January 2, 2008 new date for trial and that the discovery deadlines would "run from the January 2, 2008 bench trial or hearing date as if it had been the original date." The trial court issued a corresponding minute order on August 23, 2007. Thus, Sitrick's claim of "ambush" is without merit.

C. *Unclean Hands Claim*

Sitrick contends that the judgment must be reversed, in that Kavanaugh was barred from obtaining declaratory relief by the unclean hands doctrine. Specifically, Sitrick claims that Kavanaugh either committed perjury or made a knowing misrepresentation in the 100K warranty "by admitting the value of his assets in November 2002 exceeded $100,000" in the course of the 2003 insurance litigation; Kavanaugh engaged in certain discovery abuses; and Kavanaugh improperly brought a motion to disqualify Sitrick's counsel on the first day of trial. The claims mischaracterize the record.

There is no merit to Sitrick's assertion that he may properly raise a defense of unclean hands with respect to the alleged misconduct for the first time in this appeal. It is well established that a defense of unclean hands raises a question of fact (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978) and, thus, it

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[15] Other than the reporter's transcript, we found no written order or decision on Sitrick's ex parte application.

must be raised in the trial court proceedings prior to judgment (*Marshall v. Marshall* (1965) 232 Cal.App.2d 232, 253). On appeal, we review a trial court's finding regarding an unclean hands defense under the substantial evidence standard. (*Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 56.)

In support of his assertion, Sitrick cites *Katz v. Karlsson* (1948) 84 Cal.App.2d 469, in which the reviewing court made an exception and allowed unclean hands to be raised for the first time on appeal. *Katz* involved very specific circumstances in which the facts relevant to determining whether a party had acted with unclean hands were clear, unambiguous and undisputed in the record in the form of material contradictions in sworn statements by the party in question. (*Id.* at pp. 470-472.) The *Katz* court explained that, in the interest of justice and to protect the integrity of the court, a reviewing court has a duty to invoke the doctrine of unclean hands on appeal where the trial court record shows on its face that a party has perpetrated a fraud on the trial court or otherwise failed to act in good faith toward the trial court, with the result that the court issued an order favoring the party. (*Id.* at pp. 472-474.) No similar facts are present here.

In *Behm v. Fireside Thrift Co.* (1969) 272 Cal.App.2d 15, the plaintiff made the same claim as Sitrick based on *Katz* and similar cases. (*Id.* at p. 21.) The court responded that "the cases cited by Behm for this proposition are cases involving 'flagrantly unconscionable' conduct in which the doctrine was applied to protect the court's integrity (see *Katz v. Karlsson*, [*supra*,] 84 Cal.App.2d 469 . . .). In the instant case Fireside's conduct can hardly be called 'flagrantly unconscionable' nor can it be said that the trial court's integrity would have been compromised by granting the relief requested." (*Behm, supra*, at p. 21.) In the record before us, there is no similar unequivocal evidence of "flagrantly unconscionable" conduct or any other actions by Kavanaugh of such a nature that the trial court's integrity has been compromised by granting him declaratory relief.

Sitrick asserts three instances which he claims constitute misconduct by Kavanaugh sufficient to fall within the unclean hands doctrine. Sitrick's claim that Kavanaugh admitted the value of his assets in November 2002 exceeded $100,000, in

direct contradiction of his 100K warranty, is not supported by the record and grossly mischaracterizes the evidence. Sitrick further claims Kavanaugh had unclean hands, in that the trial court awarded $3,600 in sanctions against Kavanaugh and his attorney for willful discovery abuses and otherwise improperly failing to comply with discovery requests. Sitrick also contends Kavanaugh has unclean hands, in that he undermined the trial process by bringing a motion to disqualify Sitrick's counsel on the first day of trial on the basis of the testimony of one witness, who the court did not find credible. Sitrick cites no authority that any of these types of conduct is sufficient to prove an unclean hands defense, whether the defense is raised at trial or on appeal. In any event, such claims do not rise to the level of unequivocal evidence in the record that Kavanaugh practiced a fraud on the trial court, and, therefore, they do not constitute a basis for raising a defense of unclean hands for the first time on appeal under *Katz*. (*Katz v. Karlsson, supra*, 84 Cal.App.2d at pp. 470-474.)

The other cases which Sitrick cites as support that we may apply the unclean hands doctrine for the first time on this appeal are inapposite. They are declaratory relief cases in which the applicability of the doctrine of unclean hands was raised and determined in the trial court proceedings, rather than being raised for the first time on appeal. (*Maguire v. Hibernia S. & L. Soc.* (1944) 23 Cal.2d 719, 730-731; *Fladeboe v. American Isuzu Motors Inc., supra,* 150 Cal.App.4th at p. 56.)

Contrary to Sitrick's representation that he is raising the doctrine of unclean hands for the first time on appeal, he also asserts that his actions below show that he did, in fact, raise the issue below. Sitrick claims that he called the trial court's attention to many discovery and other abuses by Kavanaugh during the course of the proceedings. He contends that, by doing so, he satisfied the requirement that the doctrine of unclean hands "'must be [either] pleaded or called to the attention of the trial court.'" (*Behm v. Fireside Thrift Co., supra*, 272 Cal.App.2d at p. 21.) Calling attention to a party's discovery abuses does not equate to raising the doctrine of unclean hands as a defense in the trial court proceedings and having the issue fully litigated by the parties in those proceedings. (*Kendall-Jackson Winery, Ltd. v. Superior Court, supra*, 76 Cal.App.4th at p. 978;

Marshall v. Marshall, *supra*, 232 Cal.App.2d at p. 253.) Therefore, Sitrick cannot raise the doctrine now on appeal.

DISPOSITION

The judgment is affirmed. Kavanaugh is entitled to recover his costs on appeal.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.